

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Implementation of the Cable Television  
Consumer Protection and Competition  
Act of 1992

Broadcast Signal Carriage Issues

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) MM Docket No. 92-259  
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**PETITION FOR PARTIAL RECONSIDERATION**

**THE WIRELESS CABLE ASSOCIATION  
INTERNATIONAL, INC.**

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## EXECUTIVE SUMMARY

The Commission should reconsider and revise the rules adopted in the *Report and Order* for establishing the circumstances under which a wireless cable operator will be required to secure retransmission consent from local broadcasters. Specifically, the Commission should amend newly-adopted Section 76.64(e) of the Rules to delete the requirement that a wireless cable operator that retains ownership and control of the VHF/UHF antenna it installs at the subscriber's premises must secure retransmission consent, even if the operator can establish that it does not charge for the local broadcast signals.

As written, Section 76.64(e) will compromise the economic viability of many wireless cable systems. Many wireless cable operators provide free VHF/UHF antenna facilities to subscribers who do not already have an adequate antenna. To the best of WCA's knowledge, no wireless cable operator imposes a higher monthly charge on subscribers that require a VHF/UHF antenna than those that supply their own.

The cost of installing VHF/UHF antennas at a subscriber's home is substantial, but ameliorated by the fact that the antenna can be reused at another site should the subscriber terminate service. The practical effect of Section 76.64(e) is to require the operator to transfer title of VHF/UHF antennas to subscribers, eliminating the potential for reuse. Indeed, Section 76.64 may inadvertently result in a substantial increase in subscriber churn as consumers learn they can subscribe to wireless, receive a free VHF/UHF antenna, and then terminate service while retaining the antenna. However, because of competitive pressures, wireless cable operators will not be able to increase installation fees or raise monthly subscription rates. Thus, wireless cable operators will be required to bear this additional cost.

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**PETITION FOR PARTIAL RECONSIDERATION**

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.106 of the Commission's Rules,<sup>1</sup> hereby petitions the Commission to reconsider in part the *Report and Order* (the "*R&O*") in the captioned proceeding.<sup>2</sup> Specifically, WCA urges the Commission to revise newly-adopted Section 76.64(e) of the Rules to eliminate the requirement that a wireless cable system operator secure retransmission consent from local broadcasters merely because the operator retains ownership and control over the VHF/UHF rooftop antennas it employs to provide its subscribers access to locally available broadcast signals at no charge.

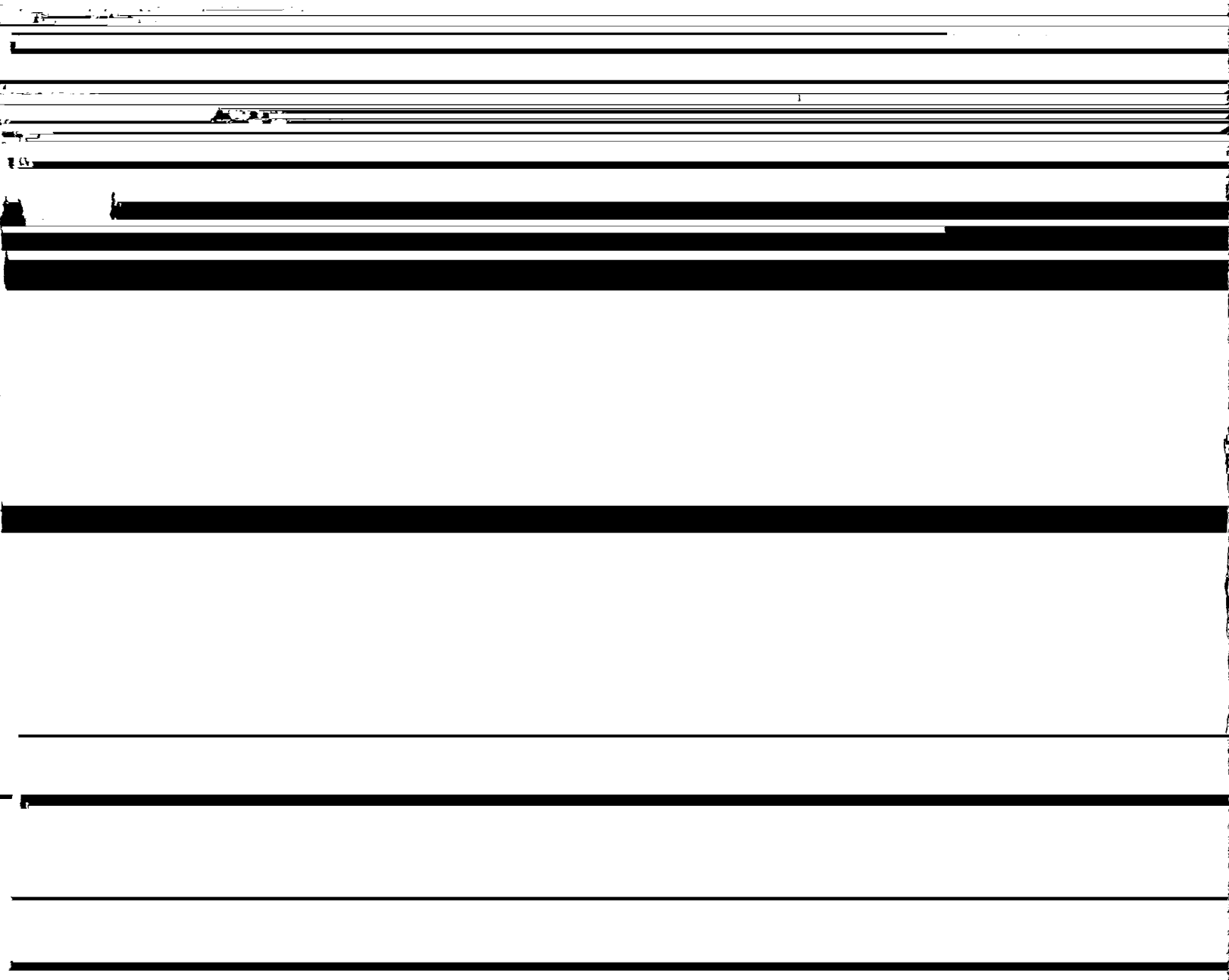
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<sup>1</sup>47 C.F.R. § 1.106 (1992).

<sup>2</sup>*Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, FCC 93-144, MM Docket No. 92-259 (rel. March 29, 1993)[hereinafter cited as "*R&O*"].

**I. WCA SUPPORTS THE FUNDAMENTAL POLICY OBJECTIVES OF THE *REPORT AND ORDER*.**

At the outset, the Commission should note that WCA is generally supportive of the fundamental policy decisions reflected in the *R&O* as they relate to the wireless cable industry. WCA certainly has no quarrel with the Commission's decision to impose retransmission consent obligations on wireless



Although the *Notice of Proposed Rule Making* provided no advance warning that such a rule was under consideration, under newly-adopted Section 76.64(e) a wireless cable operator that employs rooftop VHF/UHF antennas to receive local broadcast signals must nonetheless secure retransmission consent unless two criteria are met: (i) the signals must be made available at no charge; and (ii) the VHF/UHF antenna must be under the ownership and control of the individual subscriber or building owner.

WCA continues to believe that Congress did not intend for retransmission consent obligations to attach when a multichannel video programming distributor integrates non-broadcast programming with local broadcast programming received at the subscriber's premises using a VHF/UHF antenna.<sup>5</sup> Nonetheless, WCA does not seek reconsideration of the first element of the Commission's two-prong test, the "no charge" requirement. However, WCA submits that it is essential for the Commission to eliminate the requirement that the wireless cable operator who meets the "no charge" test still divest itself of ownership and control of the VHF/UHF antenna in order to avoid retransmission

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<sup>5</sup>*See id.* at 3-4 n. 8. Indeed, WCA finds it difficult to believe that Congress intended for some of the more absurd results that Section 76.64(e) will bring about. For example, imagine a market with five local broadcast television stations, four of which give the wireless cable operator retransmission consent. If the wireless operator retains ownership of its VHF/UHF antennas, it will have to trap out the signal of the broadcaster who failed to grant retransmission consent. Wireless cable subscribers who then desire access to that signal will have to purchase their own VHF/UHF antenna, duplicating the equipment that is already on the rooftop.

consent obligations. Simply put, this is an unnecessary requirement that will increase the cost of wireless cable service to consumers and/or hamper wireless cable operators in their efforts to compete with franchised cable.

**II. IMPOSITION OF RETRANSMISSION CONSENT REQUIREMENTS ON WIRELESS CABLE OPERATORS WHO RETAIN OWNERSHIP OR CONTROL OF VHF/UHF ANTENNAS INSTALLED AS AN AMENITY WILL UNDERCUT THE CONSUMER BENEFITS OF COMPETITION TO CABLE.**

The installation of VHF/UHF antennas at subscribers' premises is a common practice in the wireless cable industry. As a general proposition, a wireless cable operator will rely on rooftop reception of local broadcast signals in order to preserve scarce MDS and ITFS spectrum for the transmission of non-broadcast programming that cannot otherwise be delivered to subscribers' homes. Wireless cable systems generally refrain from retransmitting local broadcast signals over MDS and ITFS spectrum so long as the broadcaster is able to deliver a signal of sufficient quality throughout the wireless cable service area. By and large, it is only when a popular broadcast signal is not readily received throughout the wireless cable service area that retransmission over MDS and ITFS spectrum occurs.

When a wireless cable system operator has decided to rely on rooftop reception of local broadcast signals, the installer determines at the time of installation whether adequate VHF/UHF antenna facilities exist at a given single family home or multiple dwelling unit. If acceptable VHF/UHF antenna facilities are in place, then those facilities are retained and integrated with the MDS/ITFS

reception facilities installed by the operator, providing the consumer with seamless access to all available channels. If the single family home or multiple dwelling unit lacks adequate VHF/UHF antenna facilities (as is often the case when wireless cable service is replacing a franchised cable offering), the operator provides a VHF/UHF antenna. That VHF/UHF antenna facility is provided as an amenity -- to the best of WCA's knowledge, no wireless cable operator imposes a greater monthly charge on those subscribers that are provided a VHF/UHF antenna than is charged consumers who supply their own VHF/UHF antenna.<sup>6</sup>

Where it is necessary for a wireless cable operator to install VHF/UHF antenna facilities, the additional investment can be \$100.00 or more depending on the characteristics of the antenna required and the installation requirements at the particular site.<sup>7</sup> Although some of that cost (*e.g.* labor) is sunk, the antenna itself is recoverable and can be reused should the subscriber terminate service. The importance of that fact cannot be underscored enough, for the recoverability of

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<sup>6</sup>Indeed, when a wireless cable operator gains entry to a multiple dwelling unit setting that lacks VHF/UHF reception facilities, the operator is frequently required to provide local broadcast television signals to all residents, whether or not they subscribe to the wireless cable offering. Of course, the fact that the wireless cable operator incorporates the broadcast signals into the basic package provided its subscribers does not change the fact that those signals are offered at no charge when others can secure access to a free broadcast-only service.

<sup>7</sup>Internal wiring requirements can add to this cost substantially, particularly in multiple dwelling unit environments where local broadcast signals must be made available to all residents.



equipment upon termination of service is an important reason why VHF/UHF antennas could be supplied at no additional charge to consumers who need them.<sup>8</sup>

The effect of the *R&O* is to compromise the financial ability of wireless cable operators to provide this amenity, however. As a practical matter the Commission's retransmission consent rules now will force many wireless cable operators to vest ownership of any VHF/UHF antennas in the subscriber immediately upon installation, preventing reuse upon termination of service. Adverse economic consequences will certainly flow from this change in circumstances.

In most situations, the wireless cable operator will not be able to increase its installation charge to recoup the cost of the VHF/UHF antenna facilities. Generally, installation fees are set by the local competitive environment; *i.e.* the wireless cable operator must charge an installation fee that approximates that charged by its franchised cable competitor. Because the cost of installing a marginal wireless cable subscriber is greater than the cost of installing a marginal franchised cable subscriber, and because franchised cable operators generally set

wireless cable operator recovers the sunk costs of installing a new subscriber (*e.g.* marketing, installation labor, non-reusable equipment) through the installation fee and recover the costs of reusable equipment over time.

By increasing the cost of that non-reusable equipment as much as \$100.00 or more per subscriber, the *R&O* will have a devastating impact. Subscriber churn is a serious problem for all multichannel video programming distributors. While wireless cable operators hope to reduce churn from franchised cable levels through superior customer service, improved signal quality and innovative programming, factors such as subscriber relocation, financial pressures and competitive alternatives make churn inevitable. The Commission has now exacerbated the problem by giving consumers incentive to subscribe to wireless cable, receive a free VHF/UHF antenna, then terminate service and keep the antenna.

As a result, the Commission has inadvertently placed the wireless cable operator between the Scylla of increasing installation fees substantially above those charged by franchised cable to deter such conduct and the Charybdis of increasing monthly service charges to all subscribers to recoup losses from nonrecoverable VHF/UHF antenna costs caused by a few. One or the other is essential; unless additional revenues can be generated to compensate for the transfer of VHF/UHF antenna ownership to subscribers, the financial viability of wireless

cable systems will be compromised. Yet, neither alternative is acceptable; either will adversely impact wireless' ability to effectively compete in the marketplace.

### **III. NO POLICY OBJECTIVE IS ADVANCED BY SECTION 76.64(E)'S "OWNERSHIP AND CONTROL" TEST.**

Reconsideration of the *R&O* is especially appropriate because the "ownership and control" test of Section 76.64(e) is not grounded in any substantial policy objective. Indeed, the *R&O* is silent as to why ownership or control over the VHF/UHF antenna facilities should be at all relevant to whether retransmission consent is required. In explaining the rationale behind Section 76.64(e), the Commission makes analogies to both the *First Report and Order* in Docket No. 20561 and Section 111(a) of the Copyright Act of 1976.<sup>9</sup> While both precedents provide some scant support for the imposition of the "no charge" prong of the test, neither offers any support for the making of ownership or control of the VHF/UHF antenna a determinative factor.<sup>10</sup>

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<sup>9</sup>See *R&O*, *supra* note 2, at ¶ 135 nn. 375, 376.

<sup>10</sup>In its 1977 *First Report and Order* in Docket No. 20561, the Commission was faced with determining whether master television antenna ("MATV") systems should be subject to the Commission's rules applicable to cable systems. In that decision, the Commission determined that any facility "that serves or will serve only subscribers in one or more multiple unit dwellings under common ownership, control or management" would be subject to the cable rules. See *Amendment of Part 76 of the Commission's Rules and Regulations with Respect to the Definition of a Cable Television System and the Creation of Classes of Cable Systems*, 63 F.C.C.2d 956, 997 (1977). Although the *First Report and Order* does make reference to the fact that MATV service is generally provided at no charge to residents as an amenity, who owned or controlled the MATV system was not  
(continued...)

As best as WCA can fathom, it appears that the Commission imposed the ownership and control test in the belief that it was necessary to assure that the local broadcast signals were being provided at no charge.<sup>11</sup> That is simply not the case -- there is a much simpler mechanism for assuring that a wireless cable operator who retains ownership and control of the VHF/UHF antenna facilities it installs does not charge for the local broadcast signals. The Commission can make clear that a wireless cable operator who chooses to retain ownership and control of the VHF/UHF antenna facilities it installs must not impose an additional installation fee<sup>12</sup> or monthly charge as a result. Compliance can be readily monitored by local

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<sup>10</sup>(...continued)

deemed to be of import. Thus, while the *First Report and Order* can be cited to support the decision to exempt wireless cable operators who provide a VHF/UHF antenna at no charge from retransmission consent, the *First Report and Order* does not support limiting the exemption to wireless cable operators who divest themselves of ownership and control of the antenna facility.

The same is true with respect to Section 111(a). Under Section 111(a), an MATV system is deemed not to infringe on copyright when it distributes programming at no charge to residents of a dwelling. While that system must be provided by the management of the building, Section 111(a) has never been interpreted in such a way that ownership or control of the system is relevant. As with the *First Report and Order*, while Section 111(a) can be cited to support the decision to exempt wireless cable operators who provide a VHF/UHF antenna at no charge from retransmission consent, it does not support limiting the exemption to wireless cable operators who divest themselves of ownership and control of the antenna facility.

<sup>11</sup>See *R&O*, *supra* note 2, at ¶135.

<sup>12</sup>The Commission should not, however, alter the practice of a few wireless cable operators who sell VHF/UHF antennas to subscribers for a fee. In those cases, because  
(continued...)

broadcasters, for wireless cable rates are widely available in the community. It should be simple for a wireless cable operator to establish that its rates are identical regardless of whether the subscriber or the wireless cable operator provides the VHF/UHF antenna.

**IV. IF VHF/UHF ANTENNA OWNERSHIP IS RELEVANT, THEN THE COMMISSION SHOULD ADOPT RULES GOVERNING THE TRANSFER OF TITLE UPON TERMINATION OF SERVICE MODELED ON ITS NEW HOME WIRING RULES.**

There is some suggestion in Paragraph 135 of the *R&O* that the “ownership and control” test was developed out of a concern over continued reception of local broadcast signals after wireless cable service is terminated. WCA finds that concern ironic, given that the Commission has never acted to prevent franchised cable operators from removing their subscribers’ existing VHF/UHF antennas when installing cable service. Nor does WCA see how that concern is relevant for retransmission consent purposes -- so long as no charge is being made for the service today, there is no justification for the Commission to impose retransmission consent requirements merely because free access may terminate sometime in the future.

Be that as it may, there is a less intrusive mechanism for assuring that wireless cable subscribers can continue to receive locally available broadcast

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<sup>12</sup>(...continued)  
title to the equipment vests in the consumer immediately upon sale, the additional fee is not objectionable.

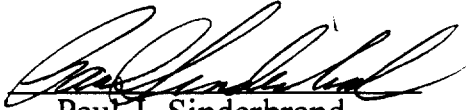
signals upon termination of service. The appropriate model was adopted in the recent *Report and Order* in MM Docket No. 92-260 -- the cable home wiring proceeding.<sup>13</sup> In that proceeding, the Commission adopted Subpart M of Part 76, which permits a cable operator to retain ownership and control over inside cabling, provided that it offers to sell that wiring to the subscriber upon termination of service at replacement cost.<sup>14</sup> WCA would not object if the Commission adopts a similar requirement here. Under such an approach, a wireless cable operator could retain ownership and control over its VHF/UHF antenna facilities and still avoid retransmission consent obligations, so long as the operator permits the subscriber to purchase the antenna at replacement cost upon termination of service.

WHEREFORE, for the foregoing reasons, WCA urges the Commission to reconsider the *R&O* and amend Section 76.64 by deleting the second sentence thereof so that no retransmission consent will be required when a wireless cable operator installs a rooftop VHF/UHF antenna used to access local broadcast signals at no charge, even if the operator maintains ownership and/or control over the

ownership and/or control over the VHF/UHF antenna used to access local broadcast signals at no charge, so long as the subscriber has the right to purchase the antenna facilities upon termination of service.

Respectfully submitted,

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